

Board to remove a guidance counselor position from the bargaining unit represented by the Association. The Board filed its answer on July 10, 1996 after which this case was heard by the PELRB on September 10, 1996.

FINDINGS OF FACT

1. The Mascenic Regional School Board is a "public employer" of teachers and other professional personnel employed by the Mascenic Regional School District within the meaning of RSA 273-A:1 X.
2. The Mascenic Education Association/NEA-NH is the duly certified bargaining unit for teachers and other professional personnel employed by the Board.
3. The Board and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 1998. Article I thereof is the Recognition Clause and provides:
 - 1.1 The Mascenic Regional School Board recognizes the Mascenic Education Association/NEA New Hampshire as the exclusive bargaining representative for all teachers, and others, as defined in Section 1.2, employed by the Mascenic Regional School system for the purpose of negotiating with the Board with respect to terms and conditions of employment pursuant to RSA 273-A.
 - 1.2 The term "teacher" shall mean a full time professional employee whose main duty is classroom teaching and whose position requires certification by the State Board of Education. The Mascenic Regional School Board recognizes the Mascenic Education Association as the exclusive bargaining representative for all nurses, guidance counselors, and librarians employed full time by the Mascenic Regional School District for the purpose of negotiating with the board with respect to terms and conditions of employment pursuant to

RSA 273-A.

- 1.3 The term "teacher" shall exclude all others employed by the Board including: Superintendents, Principals, Administrative Personnel, Teacher Consultants, Teacher Aides, Custodial Personnel, Food Service Personnel, other persons employed by the State Board, any other administrative or supervisory employee.
4. The recognition clause does not address a Director of Guidance position, either by inclusion or exclusion. Notwithstanding this, a job description for Director of Guidance was created in 1991 according to Karen McDonough, a teacher in the District for thirteen years, and Association Exhibit No. 4. James O'Loughlin was identified as Director of Guidance on Mascenic Regional High School stationery in 1992; Edward Zehnder was similarly identified on the same stationery in 1996. (Assn. Ex. Nos. 2 and 5) Both individuals were compensated according to their academic credentials and longevity according to the teachers' salary scale; neither received special or additional compensation for being Director of Guidance.
5. Kevin Corriveau is an English and music teacher with twenty years of service in the District. He testified that all professional and certified personnel, inclusive of guidance counselors and the Director of Guidance were considered to be in the bargaining unit since the mid-1970's. He identified Richard Powers as being the incumbent Director of Guidance at that time. Likewise, he said administrators have been out of the bargaining unit since the 1970's but that this exclusion never applied to the Director of Guidance position.
6. High school principal Dana McKenney testified there was no individual designated as Director of Guidance when he began his employment in 1992. Thereafter, the Director of Guidance job title was used as a convenience to have a focal point on the letterhead. He stated that Zehnder was hired as a guidance counselor, not as Director of Guidance.

7. After discussions about the Director of Guidance position during the spring of 1996, the Board approved a new job position for the Director of Guidance and Student Services on June 3, 1996. (Board Ex. No. 1 consisting of three pages.) According to that document and McKenney's testimony, the position is now system-wide, covers grades 1 through 12, evaluates and may recommend discipline for guidance personnel, gets a 220 day contract and reports directly to the Superintendent rather than the high school principal. The new Director of Guidance is expected to contribute to the development of policy, inclusive of labor relations policies.
8. Both McKenney and Superintendent Francine Fullam rebutted the Association's claim that the newly designated and advertised Director of Guidance position removed unit work from bargaining unit personnel by testifying that there were 4.6 guidance positions in the unit before the June 3, 1996 approved of the position for the Director of Guidance. Currently, 4.6 guidance positions remain in the unit with one being vacant and unfunded.

DECISION AND ORDER

Both the Board and the Association have presented valid concerns as to why they should prevail in the relief requested in this case. The Association is worried about the loss of unit work, the creation of a supervisory job in name only where the majority of the director's duties will continue to involve the day-to-day functions of a guidance counselor and the improper creation of a new position without removing it from the bargaining unit by use of a Modification Petition, as contemplated by Rule PUB 302.05. The Board asserts that the statute, RSA 273-A:1 XI, permits it to create a new supervisory position, that the position may be involved in labor relations matters such as to accord it a confidential exclusion under RSA 273-A:1 IX and *Appeal of Town of Newport*, 140 NH 343 (1995), and that supervisors cannot be in the same bargaining unit with employees whom they supervise, RSA 273-A:8 II, *Appeal of Manchester Board of School Committee*, 129 NH 151 (1987) and *Appeal of East Derry Fire Precinct*, 137 NH 607 (1993). In these circumstances, we find the weight of the evidence to be in favor of the Board.

The Board must, according to statute, be able to set its organizational structure as well as determine the number of personnel and the manner of supervision under RSA 273-A:1 while meeting the community of interest and supervisory considerations of RSA 273-A:8. The evidence before us suggests that the Board has done no more than just that.

Notwithstanding these findings, above, it is apparent from the pleadings and the testimony that the manner in which the Board proceeded in creating the new position was unnecessarily confusing, especially given that both the "old" position (Association Ex. Nos. 2, 4 and 5) and the "new" position were both commonly referred to as the "Director of Guidance." The Association was correct in its assertion that this should have been handled by way of modification proceedings under Rule PUB 302.05 given the "change in circumstances" and job responsibilities being assumed by the "new" director. Had this process been followed, the confusion would have been avoided and the parties would have been able to discuss job content, the Board's reasons for creating the new position, whether there was a deterioration or improper removal of bargaining unit work and if there was cause for impact bargaining.

Based on our findings, above, we DISMISS the ULP and, in so doing, find the Board's failure to utilize the appropriate procedures did not rise to the level of a ULP, especially since both the issues raised by a ULP or by a modification petition would ultimately be decided and/or reviewed by the PELRB and now have been.

So ordered.

Signed this 7th day of OCTOBER, 1996.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Richard E. Molan, Esq. and William F. Kidder present and voting.